Supreme Court, U.S.
FILED
MAR 22 2002
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No. 01-1075

IN THE

Supreme Court of the United States

UNITED STATES EX REL. ABRAHAM GALE,

Petitioner,

v.

ZENITH DATA SYSTEMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Zenith Data Systems ("ZDS") certifies that as of 1994 it was a subsidiary of Bull Data Systems, Inc., a Delaware corporation; that it became a wholly-owned subsidiary of Packard Bell NEC, Inc. (then known as Packard Bell Electronics, Inc.) commencing April 3, 1996; that it merged into Packard Bell NEC, Inc. effective March 31, 1997; that thereafter it continued business as the "Zenith Data Systems Division" of Packard Bell NEC, Inc. for approximately a year; that, to the extent it had not previously ceased operations, it totally ceased doing business by December 31, 1999, the date Packard Bell NEC, Inc. ceased operations; and that Packard Bell NEC, Inc. changed its name to PB Electronics, Inc. ("PB") effective April 3, 2000. ZDS further certifies that shares of PB (and its predecessors) are not (and were never) traded on any public exchange. ZDS further certifies that the present stockholders of PB are (i) NEC Corporation, a Japanese corporation, which owns approximately 88% of PB's capital stock, and (ii) Bull S.A., and Bull Data Systems, Inc., a subsidiary of Bull S.A., which together own approximately 12% of PB's capital stock; that the shares of NEC Corporation are traded on the public exchange of Japan; that American Depositary Receipts of NEC Corporation are traded in the United States on the New York Stock Exchange; and that the shares of Bull S.A. are traded on the public exchanges of France, Germany and Switzerland.

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Boese, Civil False Claims and Qui Tam Actions, § 4.02[D][1][e] (2001-2 Supp.) 6

STATEMENT OF THE CASE[1]

A. The Underlying Facts

Petitioner Abraham Gale ("Mr. Gale" or "Petitioner") filed his complaint under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, against Respondent Zenith Data Systems Corporation ("ZDS" or "Respondent") in April of 1996. In his complaint, Petitioner claimed that Respondent had sold to the Government, as new, computers that included recycled components.

Petitioner worked for non-party Packard Bell NEC, Inc. ("PBNEC"), for approximately 10 weeks in late 1994.[2] Several months after he was terminated by PBNEC during his probationary period, Petitioner filed a False Claims Act lawsuit against PBNEC, claiming that PBNEC had committed fraud against the Government by selling to the Government, as new, PCs that contained used parts.

During the course of the Government's PBNEC investigation, the Government learned of a possibility of fraud by another company, ZDS. As found by the District Court, in 1994 and 1995 PBNEC and ZDS were separate companies. (App. B, 26a.) Bull S.A., a French corporation, was an affiliate of ZDS. Bull S.A. (not ZDS) also owned

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1. For a more complete statement of the relevant facts and procedural history, Respondent respectfully refers the Court to the Ninth Circuit opinion, *Seal v. Seal*, 255 F.3d 1154 (9th Cir. 2001), attached as Appendix A ("App. A") to the Petition for Certiorari ("Pet.") at pages 1a-17a.

2. During the period of Petitioner's employment, PBNEC was known by its former name – Packard Bell Electronics, Inc.

20% of PBNEC (at the time known as Packard Bell Electronics, Inc.). Pursuant to a joint manufacturing arrangement in effect in 1994 and 1995, PBNEC manufactured certain desktop computers for ZDS.[3]

The Government learned of the possibility of ZDS fraud not from Petitioner, but from PBNEC's arch rival, Compaq Computer Corporation ("Compaq"), which had also sued PBNEC for allegedly selling PCs that contained used parts. Based on Compaq's tips, in September of 1995, the United States Attorney's Office ("USAO") opened an investigation of ZDS. The Air Force Office of Special Investigations ("OSI") also launched an investigation of ZDS at the request of the USAO.

By no later than March 25, 1996, the Government's lawyers mentioned to Petitioner that they had learned months earlier from Compaq that ZDS had potentially sold PCs to the Government that contained used components. Less than a month after learning this information from the Government, Petitioner filed a brand new FCA lawsuit, this time against ZDS.

B. Jurisdiction Under The False Claims Act

31 U.S.C. §§ 3730(e)(4)(A) and (B) limit the courts' jurisdiction under the False Claims Act. As relevant here, the court must first determine whether, before the date the complaint was filed, there has been a "public disclosure" in one of the enumerated fora of the "allegations or transactions" on which the claim is based. If there has been no "public

3. In April 1996, ZDS became a wholly-owned subsidiary of PBNEC. In 1997, ZDS became a division of PBNEC.

disclosure," the court has jurisdiction over the FCA action even if the relator was not the "original source" of the information. If, however, the allegations or transactions were publicly disclosed, the relator may bring suit only if he or she was an "original source" of the information on which the allegations are based. (App. A, 7a-8a.)

C. The District Court's Dismissal Of The Action

The District Court held a three day evidentiary hearing to determine whether it had jurisdiction over Petitioner's FCA complaint against Respondent, at which time Petitioner, various Government agents, attorneys in the USAO, and others testified. In his testimony, Petitioner claimed that he learned of the alleged ZDS fraud during his short employment with PBNEC in late 1994 and as a result of his own independent investigation conducted after he was fired by PBNEC, but prior to the Government's disclosure to him of any facts or allegations concerning the alleged ZDS fraud.

The District Court concluded that Petitioner did not learn about the alleged ZDS fraud from either his experiences at PBNEC or from any independent investigation prior to the Government's disclosures to him. The District Court rejected Petitioner's contrary testimony, stating: "inconsistencies in Mr. Gale's testimony abound. We find that Mr. Gale's testimony is not credible." (App. B, 21.) The District Court noted that Petitioner's testimony on these issues was contradicted by testimony from other, more credible witnesses, and that the Court's factual findings were also supported by the absence of any references to ZDS in any of the various documents submitted by Petitioner to the Government prior to the filing of his FCA complaint against Respondent. (App. B, 19a-22a.) Among other things, the

District Court found that Petitioner's counsel had no knowledge of ZDS prior to filing the PBNEC complaint in April 1995 (App. B, 20a.), that "[Mr.] Gale was never an employee of [ZDS] and was not an 'insider' who was otherwise involved in or knew about the [ZDS] fraud before the Government disclosed it to him" (App. B, 24a.), that prior to filing his action against Respondent "Mr. Gale never told the Government that he had any personal knowledge of [ZDS]" (App. B, 21a.), and that Petitioner mentioned nothing about the "contracts and sales [between ZDS and the Government] in either his [ZDS] Complaint or his Written Disclosure of Relator filed in the [ZDS] case." (App. B, 22a.)

After finding that Petitioner had no knowledge of the alleged ZDS fraud prior to, or independent of, the Government's disclosure to him, the District Court held that the Government's disclosures to Petitioner about the alleged ZDS fraud constituted a "public disclosure" under § 3730(e)(4)(A), and that Petitioner was not an "original source" under § 3730(e)(4)(B). (App. B, 24a-25a.) The District Court found that "the only connection between [Mr.] Gale's Packard Bell allegations and the resulting allegations against [ZDS] is that during the course of generally investigating Packard Bell, AUSA Hershman came across information regarding possible [ZDS] fraud." (App. B, 26a.) The District Court held that this "tenuous connection between the information provided to the Government about one company (Packard Bell) and the resulting allegations against another, separate company ([ZDS])" (App. B, 26a.) was insufficient to support a finding that Petitioner was the "original source" of the ZDS allegations. Based on these holdings, the District Court

dismissed Petitioner's FCA complaint against Respondent on the grounds that the Court lacked jurisdiction over the complaint.

D. The Ninth Circuit's Decision Affirming The Dismissal

Petitioner changed the focus of his arguments before the Ninth Circuit. In lieu of depending on his now-discredited testimony, Petitioner contended that the District Court had jurisdiction over his FCA complaint against Respondent even under the facts as found by the District Court. The Ninth Circuit rejected Petitioner's arguments, and affirmed the judgment of the District Court, concluding that the Government's disclosures to Petitioner constituted "public disclosures" and that Petitioner's role in prompting the Government to initiate an investigation *into PBNEC* was insufficiently connected to the separate investigation into alleged fraud *by ZDS* to consider Petitioner to be an "original source" of the ZDS allegations.

The Ninth Circuit concluded that "[Mr.] Gale was an outsider to the [ZDS] investigation" (App. A, 13a.) at the time that Government lawyers "informed [Mr.] Gale that there was a possibility that some [ZDS] computers sold to the Government had contained used PBNEC parts." (App. A, 4a.) The Ninth Circuit also observed that "[Mr.] Gale played no active role in any Government investigation, and [Mr.] Gale obtained his information about [ZDS] from the Government." (App. A, 17a.) Finally, the Ninth Circuit concluded that at the time the allegations were first brought against ZDS, "it was a separate company from PBNEC, the company named by [Mr.] Gale in his original disclosure." (App. A, 17a.)

The Ninth Circuit expressly limited its holding on the "public disclosure" issue to the specific facts of this case: (1) disclosure to an "outsider" who was not employed by the FCA defendant, (2) who had no knowledge of the alleged fraud prior to the Government's disclosures and learned of it from those disclosures, and (3) who seeks to take advantage of the disclosures by filing an FCA action.

> Disclosure of information to one member of the public, when that person seeks to take advantage of that information by filing an FCA action, is public disclosure. . . . [I]t is public as to Gale, in the sense necessary to the sensible operation of § 3730(e)(4)(A). Because it was disclosed to an outsider to the investigation who now seeks to profit from it as an FCA relator, it was publicly disclosed to that person.

(App. A, 14a.)

In holding that Petitioner was not an "original source" of the public disclosure of the alleged ZDS fraud, the Ninth Circuit clarified the test previously set forth in its earlier decision in *United States ex rel. Barajas v. Northrop*, 5 F.3d 407 (9th Cir. 1993).[4] Rather than interpret *Barajas* to mean that a relator will be considered an "original source" so long as he or she played some part, no matter how remote, in the public disclosure, the Ninth Circuit limited the *Barajas* holding, and explained that the determination of "original source" status must also consider

4. Before the Ninth Circuit's clarification in the decision below, the *Barajas* holding was described as the "broadest holding of original source eligibility to date. . . ." Boese, Civil False Claims and Qui Tam Actions, § 4.02[D][1][e] (2001-2 Supp.).

> (1) the degree to which the relator's information helped uncover the later allegations;
>
> (2) the degree to which other private actors helped uncover those allegations;
>
> (3) the degree to which the government played a role in uncovering those allegations; and
>
> (4) whether the later allegations are brought against the same entity as the earlier allegations.

(App. A, 16a.)

After considering these factors as applied to the facts before it, the Ninth Circuit held that Petitioner was not an "original source" of the public disclosure of the alleged ZDS fraud because his involvement in the PBNEC claims (his sole connection to the ZDS allegations) was insufficient in and of itself to qualify him as an "original source" as to the ZDS allegations. The Ninth Circuit concluded that dismissal of Petitioner's action against Respondent "is consistent with Congress' intent that the FCA not be used by people attempting to 'free ride' on information obtained from the Government." (App. A, 14a.)

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because:

1. The Ninth Circuit's decision below is highly fact specific and limited. The facts in this case are unique, and the decision is expressly limited to those unique facts. The "public disclosure" holding is specifically limited to "outsiders" who are "strangers to the fraud" and who seek to reap a financial advantage as a result of information of which they first became aware as a result of the Government's disclosure. The "original source" holding is similarly limited. Petitioner had no direct or independent knowledge of any alleged fraud *by Respondent* – he learned of the alleged ZDS fraud only as a result of the Government's disclosures to him. Petitioner's only claimed connection to the alleged ZDS fraud was the fact that he filed an action about alleged fraud at an entirely separate company (PBNEC). While the investigation into PBNEC ultimately led to a third party (Compaq) making allegations to the Government of fraud by Respondent, the Ninth Circuit correctly concluded that this connection, standing alone, was insufficient to satisfy the statutory requirement that Petitioner have "direct and independent knowledge of the information on which the allegations are based. . . ." (§ 3730(e)(4)(B).)

2. The Ninth Circuit's decision below does not conflict with any decisions of any other circuit. Petitioner attempts to "create" conflicts by twisting the holdings in this case and in the allegedly conflicting cases, by divorcing the language

of the other cases from the facts at issue therein (and ignoring the significant factual distinctions between this case and those other cases), and by reliance on his own skewed version of the facts in this case (including facts that are contrary to the factual findings of the District Court). Petitioner even goes so far as to premise one of his Questions Presented on facts that are contrary to the factual findings below. Even with these machinations, however, Petitioner still fails to demonstrate the existence of any conflict between the Ninth Circuit's decision here and any decisions in the other circuits.

In his haste to create conflicts with other circuits, Petitioner loses sight of the very limited scope of the holding in this case. The Ninth Circuit did not hold that *any* disclosure to even a single person constitutes a "public disclosure," or that a person who is the "original source" of an investigation can *never* be considered the "original source" of information or allegations learned in that or a separate investigation. *Those* issues are not raised by the Petition.

3. The Ninth Circuit's decision correctly applied §§ 3730(e)(4)(A) and (B) of the False Claims Act to the facts found by the District Court. Petitioner – who was an employee of PBNEC, a "separate company" from ZDS – did not learn about the alleged ZDS fraud from either his experiences at PBNEC or from any independent investigation prior to the Government's disclosures to him. Rather, Petitioner was an outsider to the ZDS investigation, played no active role in that investigation, and only obtained his information about ZDS as a result of the Government's disclosure to him. The Ninth Circuit correctly held that, under these facts, the Government's disclosure of allegations of ZDS fraud to Petitioner constituted a "public disclosure" as that term is used in the statute and that Petitioner was not

an "original source" of the public disclosure because he did not have "direct and independent knowledge of the information on which the allegations [against ZDS] [were] based. . . ." (§ 3730(e)(4)(B).)

4. The Ninth Circuit decision is consistent with the intent of the False Claims Act. "A 'whistleblower' sounds the alarm; he does not echo it." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Petitioner did not "sound the alarm" about alleged fraud by Respondent. He simply "echoed" the allegations disclosed to him by the Government. The False Claims Act was designed to provide " 'adequate incentives for whistle-blowing insiders with genuinely valuable information [while discouraging] opportunistic plaintiffs who have no significant information to contribute on their own.' " *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). Petitioner is just such an "opportunistic plaintiff." He should be discouraged, not rewarded. As noted by the Ninth Circuit itself, its holding is consistent with congressional intent to discourage parasitic lawsuits which seek a "free ride on information obtained from the government." (App. A, 14a.)

Petitioner correctly states that the proper focus of the analysis is "not on what the Government 'knows' but on what the relator brings to the case." (Pet., 5.) However, Petitioner ignores the fact that he brought nothing to the case *against ZDS*. As determined by both the Ninth Circuit and the District Court, Petitioner was a complete stranger to the alleged ZDS fraud, and first learned of it from the Government's disclosures to him. It is only by ignoring the facts and twisting the law that Petitioner can contend that "this case [is] an

ideal vehicle to resolve the mass confusion among the circuits" concerning the "original source" and "public disclosure" issues. (Pet., 5 n.1.) An "ideal vehicle" for resolving the purported confusion concerning the "original source" and "public disclosure" issues would be a case which directly raised issues as to which there is a conflict. This is not such a case.

II. THE NINTH CIRCUIT'S HOLDING ON THE "PUBLIC DISCLOSURE" ISSUE IS FACT SPECIFIC AND DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS[5]

The Ninth Circuit's holding on the "public disclosure" issue was very limited. Specifically, it held:

> Disclosure [by the Government] of information to one member of the public, when that person seeks to take advantage of that information by filing an FCA action, is public disclosure. It may

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5. Petitioner also contends that the Ninth Circuit's decision here "conflicts with other panels of the Ninth Circuit. . . ." (Pet., 7-10.) Petitioner is incorrect. The allegedly-conflicting decisions within the Ninth Circuit (*Barajas, supra*; *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma Water Agency*, 929 F.2d 1416 (9th Cir. 1991); and *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds in Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997)) are distinguishable from the present case on their facts. *Barajas* was also clarified and limited by the panel here. More importantly, even if there were a conflict between the Ninth Circuit's decision below and other decisions within the Ninth Circuit (which there is not), such an intra-circuit conflict would not be a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974).

> not be public disclosure as to some other member of the public who independently comes upon information already possessed by the government and disclosed to a person like Mr. Gale, and who then files an FCA action based on the information independently obtained. But it is public *as to Gale*, in the sense necessary to the sensible operation of § 3730(e)(4)(A). *Because it was disclosed to an outsider to the investigation who now seeks to profit from it as an FCA relator, it was publicly disclosed to that person.*

(Emphasis added.) (App. A, 14a).

Petitioner contends that this holding "expressly conflicts with other cases from other circuits that require objective and affirmative acts of disclosure to the general public. . . ." (Pet., 10.) However, the allegedly conflicting authorities fail to support Petitioner's arguments. Those arguments are also dependent, in large part, on Petitioner's personal characterization of the facts at issue in this litigation – a characterization that is (a) inconsistent with the conclusions reached by the Ninth Circuit and the factual findings of the District Court, and (b) made by an individual whose prior testimony has already been found to be "not credible." (App. B, 20a-22a.) Stated succinctly, Petitioner fails to demonstrate any basis to grant certiorari to review the Ninth Circuit's decision on the "public disclosure" issue.

A. The "Public Disclosure" Decisions From Other Circuits Which Purportedly Conflict With The Ninth Circuit's Holding Are Not In Conflict

Petitioner argues that the Ninth Circuit's decision below conflicts with cases from certain of the other circuits on the "public disclosure" issue. However, the artificial conflicts which Petitioner attempts to assert are not supported by the cases he cites. Specifically, the first conflict invented by Petitioner is one between "objective and affirmative acts of disclosure to the general public . . ." (Pet., 10.), and "private disclosure[s]." (Pet., 13.) The second purported conflict which Petitioner pretends exists is one between the present decision and those decisions holding that "federal employees can be relators. . . ." (Pet., 14.) Neither conflict actually exists.

1. There Is No Conflict Between The Ninth Circuit's Decision And Other Circuit Decisions That Petitioner Arbitrarily Labels As Requiring "Objective And Affirmative Acts Of Disclosure To The General Public."

The purported conflict between "objective and affirmative acts of disclosure to the general public . . ." and "private disclosures" is an imagined one. This distinction appears in neither the cases cited by Petitioner, nor in the present case. He simply lines up cases on one side or the other of a purported distinction which the cases themselves do not involve.

As acknowledged by Petitioner, the Ninth Circuit's decision below is consistent with the approach taken in several circuits. At page 12 of his brief, Petitioner cites to

several cases which he contends are consistent with the decision below: *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Fine v. MK - Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996), *United States ex rel. Foust v. Group Hospitalization & Medical Services, Inc.*, 26 F. Supp. 60 (D.D.C. 1998); and *United States ex rel. Gold v. Morrison – Knudsen Co.*, 870 F. Supp. 457 (N.D.N.Y. 1994). The consistent thread in these cases is that each holds that a disclosure of information pertaining to alleged fraud, to non-government persons or entities who are strangers to the alleged fraud, constitutes a "public disclosure." Thus, these cases are all consistent with the Ninth Circuit's focus on the fact that Petitioner was an "outsider" and a "stranger to the fraud."

Obviously, the existence of consistent holdings among the circuits is not a basis for granting certiorari. The important point for purposes of this Court's analysis is that none of these cases supports the existence of Petitioner's purported conflict between cases requiring "objective and affirmative acts of disclosure to the general public" and those involving "private disclosures." Similarly, none of the decisions which Petitioner contends conflict with the Ninth Circuit's decision support the existence of this purported conflict.

Contrary to Petitioner's argument (Pet., 13.), there is no conflict with the Seventh Circuit's holding in *Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608, 613 (7th Cir. 1995). In *Hindo*, the parties to the purported disclosure were non-governmental co-defendants. Neither of the parties to the communication was an "outsider" or a "stranger to the fraud." The purported "public disclosure"

was a conversation between the two parties *concerning a transaction between those parties*. *Hindo* did not involve an "outsider." Accordingly, it is clearly distinguishable from the Ninth Circuit's decision below. Just as clearly, *Hindo* does not "expressly repudiate" the Ninth Circuit's decision here.[6]

Petitioner is also wrong in his argument that "the panel's analysis was also squarely rejected by the Tenth Circuit in *United States ex rel. Ramseyer v. Century Health Care Corp.*, 90 F.3d 1514, 1519-20 (10th Cir. 1996)." (Pet., 13.) *Ramseyer* concerns a state agency report that was specifically kept confidential from the general public and was never made available to anyone other than one state agency head and the defendants. The District Court had dismissed the FCA complaint on the grounds that "because the . . . Report was available to the general public upon a written request, the 'allegations or transactions' therein were 'public[ly] disclos[ed]' within the meaning of 31 U.S.C. § 3730(e)(4)(A)." 90 F.3d at 1518. The Tenth Circuit rejected the District Court's analysis, holding only that "'public disclosure' signifies more than the mere *theoretical* or *potential* availability of information." (Emphasis added.) *Id.*, at 1519. The fact that *Ramseyer* found no "public disclosure" under these circumstances poses no conflict with the present decision. Here, there was an *actual* disclosure by the Assistant U.S. Attorney to Petitioner. Again, it is disingenuous to argue that *Ramseyer* "squarely rejected" the Ninth Circuit's analysis here.

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6. Also distinguishable on the same grounds is *United States ex rel. Durcholz v. FKW, Inc.*, 997 F. Supp. 1159 (S.D. Ind. 1998), *dismissal aff.'d on other grounds*, 189 F.3d 542 (7th Cir. 1999), which also involved conversations between private co-defendants.

Similarly, there is no conflict with *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513-1514 & n.2 (8th Cir. 1994). *Rabushka* is inapposite. It held only that the quantum and quality of the information disclosed was insufficient to constitute a "public disclosure" because it did not raise an inference of fraud. The *Rabushka* Court also noted in dicta that disclosures in corporate reports are not, by themselves, within the specified fora set forth in 31 U.S.C. § 3730(e)(4)(A). *Rabushka* did *not* hold that disclosures to creditors or in corporate reports are not "public." More importantly, *Rabushka* did not concern information given to a private citizen by the Government.

There is also no conflict between the Ninth Circuit's decision below and cases concerning disclosures in response to FOIA requests. (See cases cited at Pet., 12-13 and n.10.) The Ninth Circuit's decision does not concern FOIA requests. Therefore, cases addressing whether such disclosures constitute "public disclosures" in one of the enumerated fora pose no conflict with the present decision.

The Ninth Circuit's decision below also does not conflict with the Seventh Circuit's holding in *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999). That case merely held that disclosure by a private citizen "to a public official with direct responsibility for the claim in question" constitutes a "public disclosure." The present decision involves disclosure in the opposite direction –a disclosure *by* the responsible public official, not a disclosure *to* that public official. Accordingly, there can be no conflict between the two decisions.

Unable to demonstrate any actual conflict with the Ninth Circuit's decision below, Petitioner attempts to "create"

a conflict by arguing that this case is somehow aligned with cases "holding that potential or theoretical availability to the general public is sufficient to trigger the ['public disclosure'] bar." (Pet., 11.) However, the *potential* or *theoretical* availability of the disclosed information to the general public was not the basis for the Ninth Circuit's decision below. The Ninth Circuit's decision looked to the *actual* disclosure of the ZDS allegations to Petitioner. Nowhere in the opinion is this actual disclosure tied to any potential disclosure to others. Thus, the Third Circuit's holding in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991) (theoretical availability to the public of "unfiled discovery material" triggers the "public disclosure" bar), is not implicated here.[7]

In any event, it is of no moment to this Court's assessment of the Petition that there may be a conflict between the Third Circuit on the one hand, and the remaining circuits on the other, over the issue of whether potential availability to the general public constitutes a "public disclosure." *That* conflict cannot be resolved by granting certiorari in this case.

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7. Petitioner also argues that decisions from the Second Circuit hold that potential or theoretical availability to the public triggers the "public disclosure" bar. However, the only Second Circuit case he cites, *Doe*, *supra*, actually rejects the Third Circuit's holding that mere theoretical availability of the information to the general public is sufficient. *Doe*, 960 F.2d at 322-323. Accordingly, it is unclear why Petitioner believes that the Second Circuit is in accordance with the Third Circuit on the "potential availability" issue.

2. There Is No Conflict With Decisions Holding That Federal Employees Can Be Relators

Petitioner is also incorrect in his argument that the Ninth Circuit's decision "also conflicts with decisions holding that federal employees can be relators. . . ." (Pet., 14.)[8] Petitioner fails to explain how or why there is a conflict with these cases. In fact, no conflict exists. Petitioner was not a federal employee. Therefore, the cases are all easily distinguished. Moreover, the cited cases hold only that there is no "public disclosure" when the "relator-as-government-employee" discloses information to himself or herself as the "relator-as-private-citizen." Nothing in the Ninth Circuit's decision below conflicts with the refusal to recognize the artificiality of a purported "disclosure" by a relator to himself or herself. The opinion in the present case is limited to its facts and does not concern federal employees as relators.

B. Petitioner's Assertion Of A Conflict Is Dependent Upon His Attack On The Factual Findings Of The District Court

Petitioner's attempt to create a conflict is also premised on factual assumptions that are inconsistent with the record. Petitioner argues that he "was not an 'outsider'. . . ." (Pet., 9.) This contention, however, is contrary to the conclusions of the Ninth Circuit. ("Gale was an outsider to the [ZDS] investigation. . . .") (App. A, 13a.) He was also

8. In support of this argument, Petitioner cites *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma Water Agency*, 929 F.2d 1416 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990); *United States ex rel. Givler v. Smith*, 750 F. Supp. 72, 75 (E.D. Pa. 1991); and *Erickson ex rel. United States v. Am. Inst. of Bio. Sciences*, 716 F. Supp. 908 (E.D. Va. 1989).

an "outsider" to ZDS itself – Petitioner was employed by PBNEC, not ZDS, and was not aware of any alleged ZDS fraud from his experiences at PBNEC. (App. B, 22a.)

Petitioner also argues that both the Ninth Circuit and the District Court were incorrect in concluding that there was a "separate investigation" of ZDS. ("Contrary to the panel's assumption, . . . there was no separate ZDS investigation.") (Pet., 10.) This purported "assumption" is actually based on the District Court's factual finding that the USAO "launched an investigation of ZDS" in September 1995 (months after the filing of Petitioner's FCA lawsuit against PBNEC). (App. B, 23a.) An argument taking issue with the factual findings below is inappropriate for a writ petition.

Petitioner's general assertion of the existence of conflicts with other decisions is based in large part upon his attempt to restate the facts to bring this case within the confines of the holdings of the other cases at issue. However, Petitioner was not an "insider" – he was never an employee of ZDS and knew nothing about alleged ZDS fraud from his employment with PBNEC. (App. B, 25a.) This case is therefore distinguishable from cases involving disclosures to employees of the target of the investigation or to other participants in the fraudulent transactions. Similarly, Petitioner cannot create a conflict with those cases holding that there is no "public disclosure" when evidence is disclosed during discovery *in the relator's existing FCA action* (e.g., *Wang* and *Hagood*), simply by characterizing the ZDS investigation as occurring "in the same suit" (as opposed to a "separate investigation") as his FCA action against PBNEC. Petitioner's version of the facts was rejected as not credible by the District Court. He cannot now rely on that rejected version of the facts to create a conflict.

Petitioner's "liberality" with the facts also infects the questions he presents for review. Contrary to the assertion in his first Question Presented, the Assistant U.S. Attorney's oral disclosures regarding allegations of ZDS fraud did not occur "during an ongoing investigation in a sealed case. . . ." Rather, as noted above, the District Court found that a separate investigation of the allegations of ZDS fraud was initiated in September 1995, prior to the Government's disclosures to Petitioner (App. B, 23a.), as distinct from the investigation in Petitioner's separate *sealed* FCA action against PBNEC.[9] The fact that Petitioner's Question Presented is based on a false factual premise is sufficient, in and of itself, to support this Court's denial of certiorari.

The issue before this Court is not whether to grant certiorari in some hypothetical case invented by Petitioner. The issue is whether certiorari should be granted in *this* case. It is respectfully submitted that Petitioner's attempts to argue the factual findings of the District Court to create the requisite conflict, and his attempts to twist the holding of the Ninth Circuit, are strong evidence of the lack of merit to his Petition.

C. Petitioner's Remaining Arguments On The Public Disclosure Issue Lack Merit

Petitioner also attacks the limitation of the Ninth Circuit's holding that there was a "public disclosure" as to Petitioner (but not necessarily as to other members of the

9. Petitioner's assertion that the Assistant U.S. Attorney's oral disclosures to him were "private confidential [and] privileged" is also unsupported by any factual findings below. Respondent and the USAO have always contended throughout this litigation that any agreement governing the confidentiality and use of information discovered by Petitioner in reviewing documents subpoenaed by the Government from PBNEC did not extend to any oral statements between the Assistant U.S. Attorney and Petitioner.

public). (App. A, 14a.) Petitioner argues that if he "is barred by the disclosure, as an outsider and member of the public, then so must be the public at large." (Pet., 10.) First, the Ninth Circuit's statement regarding this issue is dicta. Moreover, Petitioner's argument also ignores the qualification that the Ninth Circuit's discussion is directed to a "member of the public who independently comes upon information already possessed by the government . . . , and who then files an FCA action based on the information independently obtained." (App. A, 14a.) Thus, the Ninth Circuit's decision is merely restating the law that an FCA action by an "original source" will not be barred by a prior public disclosure.

There is also no merit to Petitioner's argument concerning the "ordinary meaning" of the term "public disclosure" and the intent of Congress in that regard. (Pet., 7 and 18-21.) The dictionary definitions referenced by Petitioner do not address the issue here – whether a "public disclosure" must be a disclosure to the "public at large" rather than a disclosure to a single member of the public. None of the cases that Petitioner cites holds that a disclosure is disqualified from being a "public disclosure" merely because it is to a single person. Indeed, the courts have found the existence of a "public disclosure" based on disclosure to a single person who is an "outsider," (*see, e.g., Fine v. Advanced Sciences*, 99 F.3d at 1005-1006 (disclosure to single representative of the AARP)), or based on disclosure to a limited group of people who are outsiders (*see, e.g., Doe, supra*, and *Foust, supra*).[10]

10. *See also, Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-109 (1980) (construing the term "public disclosure" as used in the Consumer Product Safety Act, 15 U.S.C. § 2055, to include within the term "public" a person who is a FOIA requester).

Contrary to Petitioner's assertion, the Ninth Circuit's decision here also does not reinstitute the "government knowledge" defense. The Ninth Circuit found a public disclosure based on the Government's actual disclosure to Petitioner, not merely because the Government possessed information within its files.

Petitioner's proffered evidence of purported congressional intent that "public disclosure" means "disclosure to the public at large" should also be disregarded by this Court. Representative Berman's statement in that regard quoted in the Petition (Pet., 19.), was made thirteen years after the 1986 amendments to the FCA. Such post-enactment pronouncements by congressional sponsors are irrelevant to the determination of congressional intent. *See United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999) (declining to give any weight to the same remarks by Representative Berman).

The Ninth Circuit's decision below also does not raise the specter of jurisdictional bars against relators who have spent significant time and resources in investigating fraud. The only relators who might be adversely affected by the Ninth Circuit's decision in this regard are persons, such as Petitioner, who have no independent knowledge of the fraud and who in lieu of such knowledge seek to take advantage of the Government's investigative efforts for their own private financial gain. Relators with direct and independent knowledge of the fraud (i.e., "original sources") will not be affected by the Ninth Circuit's construction of "public disclosure."

Cases discussing the fora within which a disclosure must be made (*See, e.g.*, Pet., 11 n.7, 8 and 9) are also irrelevant. The disclosures at issue herein occurred in an "administrative . . . investigation" as required by § 3730(e)(1). As expressly stated in the Ninth Circuit's opinion, "the Air Force Office of Special Investigations ('OSI') also launched an investigation of [ZDS] at the request of the USAO." (App. A, 3a.) An investigation by the OSI is an "administrative investigation." *Doe*, 960 F.2d at 319 and 323. Because the Assistant U.S. Attorney's disclosures to Petitioner occurred within the scope of the joint OSI/ DOJ investigation, they occurred in an "administrative investigation." Petitioner did not even raise this "fora" issue in his briefs before the Ninth Circuit. The forum within which the disclosures took place is not an issue.[11]

Finally, Petitioner's argument for a "bright line" standard of public disclosure (Pet., 20.) is also not supported by the language of the FCA. It is impossible to reconcile the FCA's inclusion of "administrative investigations" among the public disclosure fora with Petitioner's complaint that "there are no bounds as to when an investigation begins and ends, and virtually no limits on documentary and oral contact with the 'outside' that could trigger the bar." (Pet., 20.)

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11. Although the Ninth Circuit discussed the issue of the exclusivity of the fora enumerated in the FCA, that discussion was unnecessary to its holding in light of the fact that the OSI investigation was, in fact, an "administrative investigation" within the meaning of the statute. Accordingly, the panel's discussion of the fora issue is not an appropriate basis on which to premise a grant of certiorari.

III. THE NINTH CIRCUIT'S HOLDING ON THE "ORIGINAL SOURCE" ISSUE IS FACT-SPECIFIC AND IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

Petitioner argues that the Ninth Circuit's decision conflicts with other circuits, the language of the FCA and congressional intent, in its failure to treat Petitioner as an "original source" of the allegations in his ZDS complaint. Specifically, Petitioner contends that because he "was the original source of information about alleged fraud at PBNEC, and [his] information prompted the government to initiate an investigation into that company which "started the government on the trail that eventually led to ZDS's alleged fraud," (App. A, 16a-17a.), he is *necessarily* an "original source" of the ZDS allegations. (Pet., 15-18.) However, the Ninth Circuit's holding on the "original source" issue does not conflict with any authorities from other circuits. It is also consistent with both the language of the FCA and the intent of Congress. Petitioner's arguments to the contrary are demonstrably incorrect (and, in some cases, dependent on Petitioner's personal interpretation of the "facts," which conflicts with the findings of the Ninth Circuit and the District Court).

A. The Ninth Circuit's Fact-Specific Holding Is Consistent With The FCA's Requirement That An "Original Source" Have Direct And Independent Knowledge Of The Information On Which The Allegations Are Based

31 U.S.C. § 3730(e)(4) provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a

> criminal, civil, or administrative hearing, in a Congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has *direct* and *independent* knowledge of the information *on which the allegations are based* and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(Emphasis added.)

Here, both the Ninth Circuit and the District Court concluded that Petitioner learned of no information concerning alleged fraud by Respondent during, or as a result of, his employment by PBNEC. Nor did he learn of the alleged ZDS fraud as a result of any independent investigation prior to the Government's disclosures to him. Rather, Petitioner "obtained his information about [ZDS] from the government." (App. A, 16a-17a; *see, also*, App. B, 19a-22a.) In light of these factual findings, it is difficult to discern how Petitioner could claim to have the requisite "direct and independent knowledge" of the alleged ZDS fraud to satisfy the "original source" standard expressly set forth in the statute.[12] Someone who obtains his or her information from the Government's disclosure has neither "direct" nor

12. *See, e.g., Devlin, supra*, 84 F.3d at 360-363 ("direct" knowledge derives from information obtained firsthand through the relator's own labor, and "independent" knowledge is knowledge obtained prior to the public disclosure).

"independent" knowledge of that information.[13] Rather, as found by the Ninth Circuit below, that person is a "free rider" (App. A, 14a.) whose parasitic lawsuit Congress intended to bar.

Petitioner understandably ignores this statutory language, in apparent recognition of his inability to satisfy the standard. Instead, Petitioner takes language from the opinion in *Barajas*, *supra*, (without addressing the necessary link between that language and the facts in *Barajas)*, and argues that the proper standard is, in essence, a "but for" standard. Under this "but for" test, a relator is an "original source" whenever he or she triggered the investigation that led to the publicly-disclosed information, irrespective of how distant the link was between the relator's original claim and the information or allegations which were "publicly disclosed." However, such a "but for" test finds no support in the statutory language, nor does Petitioner cite any authority supporting such a test. The one case primarily relied upon by Petitioner for this argument – *Barajas* – is clearly distinguishable on several significant points, and was considered and limited by the Ninth Circuit below.

B. The Ninth Circuit's Holding On The "Original Source" Issue Does Not Conflict With Other Circuits

Petitioner contends that the Ninth Circuit's decision on the "original source" issue conflicts with the decisions in other circuits, arguing that "other circuits have held that a

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13. Thus, and contrary to Petitioner's arguments, the Ninth Circuit's decision below did not violate this Court's mandate in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) that interpretation of the FCA should be governed by the statutory language and not some vague notion of "policy."

relator need only be an original source of some of the information on which the complaint is based." (Pet., 16.) However, the cases cited by Petitioner fail to support this argument.

United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97 (3d Cir. 2000) nowhere addresses the issue of the quantum of information the relator must provide to qualify as an "original source." Rather, the Third Circuit remanded the case to the District Court to determine whether the relators were "original sources" with respect to the claims at issue, but without providing any guidance regarding how close the relationship must be between the claims at issue and the claims asserted in the relators' original actions. *Id.* at 107-108. Thus, *Merena* does *not* hold that a relator need provide only "some of the information" supporting the claim to be considered an "original source."

United States ex rel. Fallon v. Accudyne Corp., 97 F.3d 937 (7th Cir. 1996) is completely irrelevant to the issue of the quantum of information necessary to qualify a person as an "original source." *Fallon* involved a single issue – whether the attorney's fees awarded to relator's counsel (after settlement of the FCA claim) were reasonable. *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995) actually upheld a dismissal based on the conclusion that the relator was not an "original source." More important, there is nothing in this decision which addresses the issue of the quantum or quality of information that must be supplied to render the relator an "original source." Similarly, *United States ex rel. Semtner v. Medical Consultants, Inc.*, 170 F.R.D. 490 (W.D. Ok. 1997) does not address the quantum or quality of information sufficient to support a relator's status as an "original source."

United States v. CAC-Ramsay, 744 F. Supp. 1158 (S.D. Fl. 1990), *aff'd mem.*, 963 F.2d 384 (11th Cir. 1992) is also inapt. In that case, the District Court held that there was no "public disclosure." Absent "public disclosure," no issue arises concerning the relator's status as an "original source."

Thus, none of the cases cited by Petitioner supports his assertion that "other circuits have held that a relator need only be an original source of some of the information on which the complaint is based." Accordingly, the purported conflict between the Ninth Circuit's decision below and these cases from other circuits simply does not exist.[14]

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14. In apparent recognition of the futility of his argument that the Ninth Circuit's holding on the "original source" standard creates a conflict with other circuits, Petitioner focuses much of his argument on attempting to demonstrate a conflict *within* the Ninth Circuit between the panel's holding on the "original source" standard and the earlier holding on that issue in *Barajas*. As noted above, however, intra-circuit conflict is generally not sufficient to support granting a writ of certiorari. *Davis*, *supra*. Moreover, there is no conflict between the Ninth Circuit's decision below and its earlier decision in *Barajas*. Rather, the Ninth Circuit in its decision below clarified *Barajas*, after consideration of the significant factual distinctions between that case and this case. It is also clear that the language in *Barajas* relied upon by Petitioner (a relator "is an 'original source' of allegations 'if he played some part, whether direct or indirect, in the public disclosure. . . .' ") (Pet., 15 n.11.) cannot be a general statement of the governing law because it cannot be reconciled with the statutory requirement that the "original source" have "direct and independent knowledge of the information on which the allegations are based. . . ."

CONCLUSION

For all of the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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